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NO. 95-53

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

COLUMBIA GULF TRANSMISSION COMPANY,
PETITIONER

v.

RALPH SLAUGHTER, SECRETARY OF THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

AMICUS CURIAE BRIEF OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI FILED BY COLUMBIA GULF TRANSMISSION COMPANY

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INTEREST OF THE *AMICUS CURIAE*

The Interstate Natural Gas Association of America ("INGAA") is a non-profit national trade association which represents virtually all of the major interstate natural gas transmission companies operating in the United States. The member companies account for over 90% of all natural gas transported and sold for resale in interstate commerce. INGAA's members also include major Canadian interprovincial pipeline companies subject to regulation by the National Energy Board of Canada, as well as British Gas, plc, Pemex-Gas y Petroquimica Basica of Mexico, and Gaz de France. INGAA's United States members are regulated by the Federal Energy Regulatory Commission ("FERC") pursuant to the Natural Gas Act, 15 U.S.C. §§717-717w, and the Natural Gas Policy Act of 1978, 15 U.S.C. §§3301-3432. A listing of INGAA's active members is attached to this brief as Appendix "A". Counsel for both parties have consented to the filing of this *amicus curiae* brief, and their consents are on file with the Clerk of Court.

INGAA's United States members are vitally interested in the outcome of this proceeding because they transport natural gas in interstate commerce, and have more than 300,000 miles of pipelines and related facilities, including compressor stations, both within and without the state of Louisiana, and within all of the states which have reached conflicting results on this issue as set forth in the petition of Columbia Gulf Transmission Company ("Columbia Gulf"). Thus, INGAA has a unique perspective to offer on the issues involved in this case, and its members will be directly and substantially affected by its outcome.

INGAA fully supports the position taken by Columbia Gulf throughout this litigation and, in the interest of space, relies

on the statement of the case in Columbia Gulf's petition. When the Louisiana Department of Revenue and Taxation ("Department") attempts to tax the compressor fuel at issue in this litigation, it is attempting to tax interstate commerce. The entire operation of Columbia Gulf and other similarly situated pipeline companies is the transportation of natural gas in interstate commerce. The natural gas which comprises the compressor fuel is taken directly from a pipeline involved in the continuous, uninterrupted transportation of natural gas in interstate commerce through and beyond Louisiana.

INGAA submits, for the reasons set forth hereinafter, that the applicable federal constitutional principles do not permit the imposition of the Louisiana sales and use tax under the circumstances of this case.

SUMMARY OF ARGUMENT

Columbia Gulf has argued persuasively in its petition that this case is controlled by *Helson & Randolph v. Kentucky*, 279 U.S. 245, 49 S. Ct. 279, 73 L. Ed. 683 (1929), and that the cavalier dismissal of that case as "superseded" by the Supreme Court of Louisiana was erroneous and unwarranted.

While fully supporting Columbia Gulf's position, INGAA argues further that the decision below was incorrect even when viewed solely in light of the four prong test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326, reh. den., 430 U.S. 976, 97 S. Ct. 1669, 52 L. Ed. 2d 371 (1977). That test requires a nexus between the activity being taxed and the taxing state, and that nexus is lacking here because the activity which the State of Louisiana seeks to tax is purely and simply interstate commerce itself—the continuous, uninterrupted

transportation of natural gas to points beyond the State of Louisiana.

ARGUMENT

The Department's attempted imposition of the use tax on compressor fuel powering the purely interstate transportation of natural gas violates the Commerce Clause of the United States Constitution.

In its unique capacity as representative of the interstate natural gas transportation industry, INGAA is vitally interested in the federal constitutional issues presented by this case. As a national trade association with members owning and operating more than 300,000 miles of pipeline, located in all of the states that have both upheld and struck down similar taxes,[1] INGAA and its members are also vitally interested in a definitive resolution by this Court of those federal constitutional issues.

It is INGAA's position that the attempted imposition of a state use tax on the purely interstate operations of Columbia Gulf and other pipelines similarly situated violates the Commerce Clause of the United States Constitution. The Commerce Clause provides that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Article I, Section 8, Clause 3. Over the years, the interplay between the Commerce Clause and state taxing powers has provided an extremely fertile field for litigation and dispute. At one time, the basic rule was that states could not

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[1] See Columbia Gulf's Petition, pp.8-11.

tax interstate commerce. The present rule is more sophisticated: interstate commerce may be taxed locally, but only within well-developed guidelines and limitations.

The landmark decision on the relationship between interstate commerce generally and a state's taxing powers is *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L.Ed. 2d 326, reh. den., 430 U.S. 976, 97 S.Ct 1669, 52 L.Ed. 2d 371 (1977). *Complete Auto Transit* involved the validity of a Mississippi franchise tax which was measured by gross revenues, as applied to charges for transportation of imported motor vehicles from a rail depot in Jackson to dealers throughout the state. The court "assumed" that the transportation was in interstate commerce, but nonetheless upheld the application of the tax.

Complete Auto Transit clarified much of the prior case law by reiterating that "interstate commerce may be made to pay its way" (430 U.S. at 281, 97 S. Ct. at 1080), and establishing a four part test to determine the validity of a state tax affecting interstate commerce:

1 - There must be sufficient *nexus* between the *activity* and the state to justify the imposition of the tax.[2]

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[2] In the courts below, the Department erroneously argued that the nexus required to support imposition of the tax need not be between the *activity* sought to be taxed and the taxing state, but merely between the *taxpayer* and the taxing state. To support this proposition, the Department cited *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 97 S.Ct. 1386, 51 L.Ed. 2d 631 (1977). *National Geographic* is perhaps something of an aberrant decision on this issue, based on facts totally different from those present here, and

2 - The tax must be *fairly related* to benefits provided by the state to the taxpayer.

3 - The tax must not *discriminate* against interstate commerce.

4 - The tax must be *fairly apportioned.*

If a state tax violates any one of these four prongs, then the tax must be stricken as violative of the commerce clause.

Prior to *Complete Auto Transit*, in the first reported decision on all fours with the present case, the Supreme Court of Tennessee struck down a virtually identical Tennessee sales and use tax, which was also sought to be imposed on fuel used for compression of mainstream gas being transported interstate. *Texas Gas Transmission Corp. v. Benson*, 223 Tenn. 279, 444 S.W.2d 137 (1969):

> [T]he fuel gas does not come to rest in this State nor does it become a part of the mass of property within this State. ***It furnishes energy to operate the compressors which maintain the constant flow of gas through this State in***

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in any case apparently limited to the duty to *collect* the use tax (rather than to *pay* a direct tax). 430 U.S. at 560, 97 S.Ct. at 1392. The actual test was stated very clearly in *Complete Auto Transit*, and repeated countless times thereafter: a tax may be sustained "against Commerce Clause challenge when the tax is applied to *an activity* with a substantial nexus with the taxing State . . .". 430 U.S. at 279, 97 S.Ct. at 1079 (emphasis added).

> ***interstate commerce. It is, therefore, a necessary and integral part of the interstate operation.***

Texas Gas at 139 (emphasis added).

The Tennessee court's unsuccessful search for a "taxable moment" in *Texas Gas* was a portent of this Court's more complete articulation of the nexus requirement a few years later in *Complete Auto Transit*. The importance of the decision for purposes of our present analysis is that it represents the proverbial spotted cow case, in which the court correctly concluded that the consumption of the compressor fuel involved purely interstate commerce, with no requisite in-state taxable moment.

The identical issue was considered by the Supreme Court of Wisconsin in a case decided after *Complete Auto Transit*, with the exact same result that the Tennessee Supreme Court reached in *Texas Gas*. *Midwestern Gas Transmission Co. v. Wisconsin Dept. of Revenue*, 84 Wis. 2d 261, 267 N.W.2d 253, cert. den., 439 U.S. 997, 99 S. Ct. 598, 58 L.Ed.2d 670 (1978):

> Here, the department seeks to impose a use tax on that amount of natural gas consumed in engines which provide the pressure necessary to propel the great bulk of the taxpayer's gas through interstate commerce. Although this activity takes place within the state, ***we are satisfied that this consumption is an integral part of the process of interstate commerce which does not have a substantial nexus with the state. Thus, it remains immune from state taxation by reason of the Commerce Clause.***

Midwestern Gas at 258 (emphasis added). Both the analysis and result in *Midwestern Gas* underscore the continued persuasiveness of the *Texas Gas* approach in the post-*Complete Auto Transit* world.

Both *Texas Gas* and *Midwestern Gas* cited and relied on *Helson and Randolph v. Kentucky*, 279 U.S. 245, 49 S. Ct. 279, 73 L.Ed. 683 (1929). In that case the taxpayers operated a ferry on the Ohio River between Illinois and Kentucky. All gasoline needed to fuel the ferry was purchased in Illinois, although 75% of it was consumed within Kentucky. Kentucky taxed all gasoline sold or used within the state, and sought to impose the use tax on that portion of the ferry's fuel consumed in Kentucky waters. The Supreme Court of the United States struck down Kentucky's attempted imposition of the use tax as violative of the Commerce Clause of the United States Constitution. In spite of the short shrift given *Helson* by the Supreme Court of Louisiana, it has not been overruled and provides compelling authority in support of Columbia Gulf's position in this case.[3] See also *Bingaman v. Golden Eagle Western Lines, Inc.*, 297 U.S. 626, 56 S. Ct. 624, 80 L.Ed. 928 (1936).

As noted, this case presents a clear example of an improper taxation of interstate commerce. That is not necessarily the case with conflicting decisions from other jurisdictions. For example, it clearly is not the case in *Pledger v. Arkla, Inc.*, 827 S.W. 2d 126 (Ark.), cert den., ___ U.S. ___, 113 S. Ct. 203, 121 L. Ed. 2d 144

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[3] In order to avoid repetition, INGAA does not include a detailed analysis of *Helson*. However, it joins in and supports without reservation the arguments set forth at pp.11-19 of Columbia Gulf's Petition.

(1992). In that case, the Supreme Court of Arkansas expressly noted that "Arkla owns and operates an extensive network of pipelines throughout Arkansas in which it produced, bought, transported, and sold natural gas." 827 S.W. 2d at 129. This key factual distinction ultimately controls whether the federal constitutional nexus test has been satisfied. Columbia Gulf sells no gas in Louisiana and its only intrastate "use" of the compressor fuel is to propel the balance of the gas stream on its journey to Kentucky—a direct, integral and essential part of Columbia Gulf's purely ***interstate*** operations.

The Supreme Court of Louisiana stated in its opinion that it granted a writ in this case "to consider a possible conflict with" *McNamara v. D. H. Holmes Co., Ltd.*, 505 So. 2d 102 (La. App. 4th Cir.), writ den., 506 So. 2d 1224 (La. 1987), aff'd., 486 U.S. 24, 108 S.Ct. 1619, 100 L.Ed. 2d 21 (1988).[4] However, there clearly is no conflict because of the vastly different factual backgrounds of the cases, bringing into play entirely different legal considerations. In *D. H. Holmes*, the lower courts specifically found that the catalogs at issue came to rest in the mail boxes of Holmes' Louisiana customers. The Court of Appeal cited La. R.S. 47:305(5) [the predecessor to 305(E)(1)] and held:

> The taxable moment occurs "when the property has been withdrawn from interstate commerce and has become part of the mass of the property of the taxing state."

505 So. 2d at 105 (citations omitted). With the threshold issue of Louisiana's statutory authority to levy the tax already resolved by the state courts, this Court ultimately affirmed the validity of the tax on purely constitutional grounds, noting that there was

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[4] Columbia Gulf's Petition, p.A-2.

nexus "aplenty" and citing four uncontested factors that dramatically differentiate that case from this one, and which demonstrate that the activity which *Holmes* was engaged in—the distribution of catalogs to Louisiana residents—had a very substantial nexus with the state:

1 - "Louisiana imposed its use tax only on the 82% of the catalogs distributed in-state. . . ". 108 S.Ct. 1619, 1624.

2 - "Holmes admits that it initiated the distribution to improve its sales and name recognition among Louisiana residents." *Id.*

3 - "Holmes also has . . . 13 stores and over $100 million in annual sales in" Louisiana. *Id.*

4 - "The distribution of catalogs to approximately 400,000 Louisiana customers was directly aimed at expanding and enhancing [Holmes'] Louisiana business." *Id.*

This case does not involve any such *local* factors. Interstate natural gas pipeline companies such as Columbia Gulf and other INGAA members similarly situated certainly do not sell by catalog, or in the intrastate market at all. They obviously do not seek to enhance their Louisiana name-recognition or sales or business, as D. H. Holmes did, because such considerations are irrelevant to their purely interstate operations.

This Court's most recent treatment of the interplay between the Commerce Clause and state taxing powers is also

instructive, and deals with many of the purely local factors that distinguish *D. H. Holmes. Oklahoma Tax Commission v. Jefferson Lines, Inc.*, ___ U.S. ___, 115 S. Ct. 1331, 131 L. Ed. 2d 261; reh. den., ___ U.S. ___, 115 S. Ct. 2018, 63 USLW 3833, on remand, ___ F. 3d. ___, 1995 WL 380846 (8th Cir. 1995). That case permitted the imposition of the Oklahoma sales tax on bus tickets sold for interstate trips, recognizing that the ticket was bought and sold in Oklahoma and the trip originated there. Thus, the sale of the bus ticket could be characterized as a wholly local transaction.

In stark contrast, no such local or taxable moments are present in this case. There is a continuous, uninterrupted flow of natural gas through and beyond the State of Louisiana. In order to fuel that interstate transmission, a small amount of natural gas is tapped directly from the stream and consumed immediately. If there is nexus between that activity and the State of Louisiana sufficient to justify the imposition of the use tax in *this* case, then arguably there would be sufficient nexus between any aspect of interstate commerce and the state in which it happens to take place in *any* case. INGAA submits that the practical effect of such a holding would be to come full circle, a move from the old view that interstate commerce was exempt from taxation, to an effective result that, at least insofar as the nexus requirement is involved, interstate commerce is subject to a state's unfettered taxing power. There is no indication that this Court ever intended to reach or allow such a result; indeed, *Oklahoma Tax Commission* and its predecessors indicate the exact contrary.

Quite simply, this case involves the attempted taxation by a state of interstate commerce in its purest form. That attempt is impermissible under the Commerce Clause of the United States Constitution.

CONCLUSION

As the national trade association representing virtually all of the interstate natural gas transmission companies, which do business in all of the states which have both upheld and struck down similar taxes, INGAA has a unique perspective and interest in this case. As such, it respectfully urges that Columbia Gulf's Petition for Writ of Certiorari should be granted, so that the conflicts among the states may be resolved and the issue decided definitively by this Court. INGAA further submits that the purely interstate operations of Columbia Gulf and other pipeline companies similarly situated are not properly subject to Louisiana or other state use taxes under the Commerce Clause of the United States Constitution, and that ultimately the decision of the Supreme Court of Louisiana should be reversed.

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August ____, 1995

APPENDIX "A"

Alabama-Tennessee Natural Gas Company
Alberta Natural Gas Company Ltd.
British Gas pic
The Coastal Corporation
COHO Resources, Inc.
The Columbia Gas System, Inc.
Consolidated Natural Gas Company
Delhi Gas Pipeline Corporation
El Paso Natural Gas Company
Enron Corp.
Equitrans, Inc.
Foothills Pipe Lines Ltd.
Gaz de France
Granite State Gas Transmission Inc.
Great Lakes Gas Transmission Company
KN Energy, Inc.
Koch Hydrocarbon Company
Leviathan Gas Pipeline Company
Lone Star Gas Company
Michigan Gas Storage Company
MidCon Corp.
National Fuel Gas Company
NorAm Energy Corp.
Northern Border Pipeline Company
NOVA Corporation of Alberta
Pacific Gas Transmission Company
Pacific Interstate Company
Panhandle Eastern Corporation
Pemex-Gas y Petroquimica Basica
Questar Pipeline Company
Sabine Pipe Line Company

APPENDIX "A" (cont'd)

SaskEnergy
Sonat Inc.
Tenneco Gas
TransCanada PipeLines
Valero Interstate Transmission Company
Westcoast Energy, Inc.
Williams Natural Gas Company
Williston Basin Interstate Pipeline Company

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RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
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CERTIFICATE OF SERVICE

I, John H. Cheatham, III, a member of the Bar of this Court, hereby certify that on this 14th day of August, 1995, three copies of the *Amicus Curiae* Brief of the Interstate Natural Gas Association of America in Support of Columbia Gulf's Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to James A. Burton, Esq., Simon, Peragine, Smith & Redfearn, L.L.P., 1100 Poydras Street, 30th Floor, New Orleans, LA 70163-3000, telephone: (504) 569-2030, plaintiff, and to Robert G. Pugh, Esq., Pugh, Pugh & Pugh, Commercial National Towers, 333 Texas Street, Suite 2100, Shreveport, Louisiana 71101, telephone: (318) 227-2270, counsel for respondent herein. I further certify that all parties required to be served have been served.

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